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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/786,773	02/24/2004	John Reed Benziger	10505-002	2867

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BEUSSE BROWNLEE WOLTER MORA & MAIRE
390 N. ORANGE AVENUE
SUITE 2500
ORLANDO, FL 32801

EXAMINER	
LINDSEY, RODNEY M	

ART UNIT	PAPER NUMBER
3765	

DATE MAILED: 02/23/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/786,773	BENZIGER, JOHN REED	
	Examiner	Art Unit	
	Rodney M. Lindsey	3765	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☐ Responsive to communication(s) filed on _____.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-20* is/are pending in the application.

4a) Of the above claim(s) *9,11,15,19 and 20* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-8,10,12-14 and 16-18* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☒ The drawing(s) filed on *24 February 2004* is/are: a)☒ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Election/Restrictions

1. This application contains claims directed to the following patentably distinct species of the claimed invention: Species of Figures 1A-1F; Species of Figures 2A-2C; Species of Figures 3A, 3B; Species of Figures 4A, 4B; Species of Figures 5A, 5B; Species of Figures 6A, 6B; and Species of Figures 7A, 7B.

Applicant is required under 35 U.S.C. 121 to elect a single disclosed species for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held to be allowable. Currently, claims 13 and 16-18 are generic.

Applicant is advised that a reply to this requirement must include an identification of the species that is elected consonant with this requirement, and a listing of all claims readable thereon, including any claims subsequently added. An argument that a claim is allowable or that all claims are generic is considered nonresponsive unless accompanied by an election.

Upon the allowance of a generic claim, applicant will be entitled to consideration of claims to additional species which are written in dependent form or otherwise include all the limitations of an allowed generic claim as provided by 37 CFR 1.141. If claims are added after the election, applicant must indicate which are readable upon the elected species. MPEP § 809.02(a).

Should applicant traverse on the ground that the species are not patentably distinct, applicant should submit evidence or identify such evidence now of record showing the species to be obvious variants or clearly admit on the record that this is the case. In either instance, if the

examiner finds one of the inventions unpatentable over the prior art, the evidence or admission may be used in a rejection under 35 U.S.C. 103(a) of the other invention.

2. During a telephone conversation with Mr. Joseph Fischer on January 18, 2005 a provisional election was made with traverse to prosecute the invention of Figures 1A-1F, claims 1-8, 10, 12-14 and 16-18. Affirmation of this election must be made by applicant in replying to this Office action. Claims 9, 11, 15, 19 and 20 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

Claim Rejections - 35 USC § 112

3. The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

4. Claims 1-4,8,10,12-14 and 16-18 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. In claims 1, 8, 10, 12, 13 and 16 the scope of the term "conventional" cannot be determined. Claim 8 is confusing as to how the skullcap may "comprise" the hat or cap and the hat or cap may "receive" the skullcap as an inner component. In claim 13 "said hat" line 7 has no antecedent basis.

Claim Rejections - 35 USC § 103

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

6. Claims 1-8, 10 and 12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Niv in view of Gruget. With respect to claims 1, 3, 5, 6 and 10 Niv shows weighted layers 26, 30 dimensioned to fit into a headwear equivalent to the combined features 12, 22, 28 with 12 being a skullcap comprising the weighted layers 26, 30 and with 22, 28 defining spaces for the weighted layers. Niv does not teach the weighted layers comprising an elastomer and weighted bodies and weighing between about 100 or 500 grams and about 2,000 or 3,000 grams. Gruget teaches old to form weighted layers comprising an elastomer and weighted bodies (see column 1, lines 43 -45). It would have been obvious to one of ordinary skill in the art at the time of the invention to substitute the weighted layers comprising an elastomer and weighted bodies of Gruget for the weighted layers as at 26, 30 of Niv to achieve the advantage of employing weighted layers capable of conforming to body contours as taught by Gruget (see column 1, line 47). The particular weight of the weighted layers would not have been critical since all that would have been required is that they be of any weight capable of promoting bone development. With respect to claim 2 the powdered or granular lead taught by Gruget is equivalent to lead shot as claimed. With respect to claim 4 the thickness of the weighted layer would not have been critical since all that would have been required is that the overall weight of the weighted layer be of a value to promote bone development. With respect to claim 7 the weighted layer may be seen to comprised the sleeves 22 to the inside of which is adhered the fabric liner at 12. With respect to claim 8 note the weighted cap defined by 12, 26, 30 of Niv. With respect to claim 12 in that the weighted layer allows the cap to define a line of fit it therefore conforms to the line of fit as claimed.

7. Claims 13 and 16-18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Niv in view of Kuss. With respect to claim 13 Niv shows positioning headwear 10 on a person's head, the headwear 10 comprising added mass 26, 30 within space defined by 22, 28. Niv does not teach a total mass of between about 100 and about 3,000 grams of the headwear and walking between 20 and 60 minutes while wearing the headwear. The particular weight of the headwear would not have been critical since all that would have been required is that the headwear be of any weight capable of promoting bone development. Kuss teaches old walking while wearing weighted headwear. It would have been obvious to one of ordinary skill in the art at the time of the invention to modify Niv such that the headwear is worn while walking in view of such teaching by Kuss to achieve the advantage of improving posture. The particular period of time for walking would have been considered an obvious matter of choice and design to one of ordinary skill in the art at the time of the invention since all that would have been critical is that a person walk for a time necessary to promote bone development or good posture. With respect to claim 16 note the skullcap of Niv. With respect to claims 17 and 18 the act of repeatedly performing an exercise until a desired result is achieved is old and well known.

8. Claim 14 is rejected under 35 U.S.C. 103(a) as being unpatentable over Niv in view of Kuss as applied to claim 13 above, and further in view of Gruget. Niv teaches weighted layers 26, 30 shaped to the members 22, 28 of the skullcap 12 and therefore skullcap-shaped. Niv does not teach the weighted layers comprised of an elastomer and weighted bodies. Gruget teaches old to form weighted layers comprising an elastomer and weighted bodies (see column 1, lines 43 -45). It would have been obvious to one of ordinary skill in the art at the time of the invention to substitute the weighted layers comprising an elastomer and weighted bodies of Gruget for the

weighted layers as at 26, 30 of Niv to achieve the advantage of employing weighted layers capable of conforming to body contours as taught by Gruget (see column 1, line 47).

Conclusion

9. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Note particularly, the weighted headgears of Hatch, Sharkey '095, Forrest, Sr. et al., Williams, Moss, Tarbox and Sharkey '353, the hat inserts of Theoret, Dandy, Plastino and Andersen and the elastomeric weight pads 12 of Ronca et al.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Rodney M. Lindsey whose telephone number is (571) 272-4989. The examiner can normally be reached on M-F (8:30-5:00).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, John J. Calvert can be reached on (571) 272-4983. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Rodney M. Lindsey
Primary Examiner
Art Unit 3765

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